



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: M. Dyer and Sons, Inc.--Request for Reconsideration

File: B-222648.2

Date: August 18, 1986

DIGEST

Dismissal of protest for failure to diligently pursue information which forms the basis of protest is affirmed where the request for reconsideration does not establish that the initial decision was factually or legally incorrect.

DECISION

M. Dyer and Sons, Inc. requests reconsideration of our dismissal of its protest under the Department of the Navy's request for proposals (RFP) No. N00604-85-R-0131. The RFP was for storage facilities in Hawaii.

We affirm the dismissal.

In its original protest to our Office, M. Dyer complained that DeWitt Transfer and Storage Company (DeWitt), the successful bidder, had not complied with Department of Defense Regulation (DOD Reg.) 4500.34R which was referenced in the RFP. This regulation requires, among other things, that the contracting agency obtain a report from the appropriate U.S. Army Engineer District to determine whether the prospective contractor's facility is in a 100-year flood plain. Facilities located on the 100-year flood plain are not to be approved for storage contracts. M. Dyer argued that DeWitt's facility is located on the flood plain, that it had actually been flooded in 1974, and that goods stored there had been damaged.

We dismissed the protest, because it was filed more than 4 months after the award and M. Dyer did not explain why, through diligent pursuit of information, it could not have known the basis for protest earlier. Because the Navy's solicitation clearly required compliance with the DOD Reg. and the alleged flooding of DeWitt's facility occurred 12 years ago, we concluded that M. Dyer had failed to diligently pursue the available information.

In its request for reconsideration, M. Dyer argues that it diligently pursued obtaining a flood plain map and seeking the advice of counsel to determine whether the award to DeWitt was improper. For the reasons given below, however, this argument fails to persuade us that M. Dyer was diligent and timely with its protest.

M. Dyer states that the delay in filing its protest stems in part from delay and confusion generated by the government before the IFB was issued. The Commander in Chief, U.S. Pacific Command, issued Instruction 4050.2D (Dec. 1984) stating that warehouse sites must be located so as to prevent flooding from rivers, streams and normal ground run-off during heavy rains, but failing to mention the flood plain determination required by DOD Reg. 4500.34R. M. Dyer contends that after the instruction's issuance, it was not clear whether the requirements of DOD Reg. 4500.34R still applied to Hawaii. From April 17, 1985 to September 3, 1985, the firm made numerous attempts to resolve this problem.

There is no indication that from the issuance of the RFP until January or February of 1986, M. Dyer made any further attempts to investigate the problem. After learning of the award to DeWitt in January 1986, and the location of DeWitt's warehouse, M. Dyer sought to obtain a Flood Insurance Rate map to determine Hawaii's 100-year flood plain. For no explained reason, M. Dyer obtained the map approximately 4 months later, on May 21, 1986. M. Dyer then sought the advice of counsel regarding whether the requirement in DOD Reg. 4500.34R for flood plain approval was applicable to DeWitt's warehouse. Within 10 working days of obtaining counsel's advice that the requirement probably was applicable, M. Dyer, through counsel, filed its protest with this Office.

Even if M. Dyer did not actually know the basis for protest until after conferring with counsel, the unexplained failure to obtain a flood plain map until 4 months after award constituted a failure to diligently pursue the information that formed the basis for protest. See Daniels & Parks Gen. Contractors, Inc., B-218342, May 10, 1985, 85-1 CPD ¶ 529. As stated in our prior decision, protesters have a duty to diligently pursue such information within a reasonable time. Eng'g and Professional Servs., B-219657, et al., Dec. 3, 1985, 85-2 CPD ¶ 621.

The protester, therefore, has not met his burden of showing that our prior dismissal was based upon any errors of fact or law. See Bruce Rahmani--Reconsideration, B-219312.7, Mar. 13, 1986, 86-1 CPD ¶ 249.

The dismissal is affirmed.

for *Stephen E. Van*
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General Counsel